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The question remains as to the degree of control the court may exercise over spectators at a trial without infringing the constitutional requirement. It is doubtless the duty of the court to prevent the admission of so many persons as will physically obstruct the efficient administration of the proceeding.[10] Provided that the court-room has been selected with a view to the reasonable accommodation of the public, it would seem that the attendance could be limited to the seating capacity of the room. But it is conceived that a public trial means more than one which will give the protection of publicity to the trial itself. The traditional idea of the open court is that of one to which the citizen could freely go. Accordingly, the not uncommon practice of locking the doors during the examination of each witness would almost seem a violation of the provision.[11] It would seem also that the plan of admission by tickets good for limited periods would necessarily be objectionable to this interpretation of the provision, besides offering a ready opportunity for improper exclusion.[12] The results of an open court, however, are less uniformly desirable under modern conditions. It is worthy of note that the constitutions of a few states do not expressly provide for a public trial,[13] and that in at least one of these states a statute provides that the trial of certain offenses be held behind closed doors.[14]

License Fees and Franchise Taxes. — It often becomes necessary to decide whether a so-called license fee is in reality a license, or must be regarded as a tax. It is established that a condition precedent to regarding the imposition as a license is that some privilege be conferred which it was within the power of the state to withhold.[1] Some courts maintain that even so the assessment cannot be regarded as a license if it is more than sufficient to compensate for the cost of issuing the license and of the necessary control over the business.[2] Other jurisdictions take the opposite view and hold that, so long as a privilege is conferred, it makes no difference how far the return to the state exceeds the cost.[3] Still other courts, though ordinarily recognizing the first view, make a distinction in the case of occupations that are not regarded as useful or beneficial, and here the levy is regarded as a license, though the bare cost to the state may be exceeded.[4] A further modification of the first view is that the incidental expenses incurred by the state because of the granting of the license may be taken into consideration ; and under this head would be included the expenses consequent upon increased police service necessitated by the granting of a right to sell liquor.[5] It is hard to tell, under this reasoning, where to draw the line, for one might keep on finding incidental consequences indefinitely.

It is, in fact, impossible to lay down any hard and fast rule. The nature

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10 Myers *v.* State, 97 Ga. 76, 99.
11 But see Stone *v.* People, 3 Ill. 326.
12 *Contra,* Jackson *v.* Com., 100 Ky. 239.
13 Massachusetts, New York.
14 People *v.* Hall, 51 N. Y. App. Div. 57.

1 N. Hudson Co. Ry. Co. *v.* Hoboken, 41 N. J. L. 71; Chilvers *v.* People, 11 Mich. 43.
2 People *v.* Jarvis, 19 N. Y. App. Div. 466; State *v.* Angelo, 71 N. H. 224.
3 State *v.* Bixman, 162 Mo. 1,
4 See State *v.* Bean, 91 N. C. 554, 559.
5 Cooley, Taxation, 3 ed., 1142.

of the business, the convenience or inconvenience to the public caused by granting the privilege, and the cost of issuing the license, together with any cost for the inspection of the business afterwards, are all matters to be considered; but they should rather be regarded merely as evidence to show what the real purpose and intent back of the assessment are. The fundamental consideration in each case must be to determine whether the main object of the levy is regulation or revenue. If it is for the first purpose, it should be regarded as a license, even though a considerable return is netted to the state; and if it is for the second, it should be considered as a tax, even though there may incidentally be some regulation. Examples of the assessment for regulation are the liquor license,[6] and the theatre license.[7] An illustration of the second class is a franchise tax upon an ordinary manufacturing corporation, which has recently been held by the United States Supreme Court to be a tax within the section of the Bankruptcy Act giving a preference to a state in the collection of taxes.[8] *State of New Jersey* v. *Anderson*, Dec. 10, 1906. In proportion as the need of regulation and the inconvenience to the public caused by carrying on the business may be large, so may the return to the state in the shape of revenue be considerable without the assessment being regarded as an exercise of the taxing power. What might, therefore, be a license under one state of facts, might amount to a tax under another. The hopeless conflict in the cases on this point is seeming rather than real, for the question, as largely one of fact, may be legitimately construed in different ways.

RECENT CASES.

BAILMENTS — BAILOR AND BAILEE — LIABILITY OF SHOPKEEPER FOR PROPERTY OF CUSTOMERS. — The plaintiff called at the defendants' store to purchase a vest. The clerk, being busy, told the plaintiff where the vests were piled, and suggested that he select one and try it on. After the plaintiff had done so he discovered that his own vest was gone. *Held*, that the judgment of the lower court giving the plaintiff the value of the vest and its contents cannot be sustained, since it appears the loss occurred through the negligence of the plaintiff. *Wamser* v. *Browning, King & Co.*, 36 N. Y. L. J. 1283 (Ct. App., Jan. 8, 1907).

When it is a necessary incident to the business that the customer temporarily lay aside certain property, the shopkeeper impliedly assumes the custody of the goods as a bailee, owing a duty of reasonable care. Thus a customer has recovered for garments laid aside, at the request of the clerk and in his presence, in order that other garments might be tried on. *Bunnell* v. *Stern*, 122 N. Y. 539; *contra*, *Rea* v. *Simmons*, 141 Mass. 561. That the presence of the clerk or the express invitation is not always necessary to give recovery is shown by the cases where recovery has been allowed for garments left in a bath house or in a barber shop. *Bird* v. *Everard*, 23 N. Y. Supp. 1008; *Dilberto* v. *Harris*, 95 Ga. 571. Of course, if the plaintiff has been guilty of contributory negligence he cannot recover. *Trowbridge* v. *Schriever*, 5 Daly (N. Y.) 11. In the principal case the absence of the clerk would seem to be important only as tending to show negligence on the part of the plaintiff. And it seems the question of negligence should be left to the jury, and not summarily presumed, as was apparently done here. *Cf. Hunter* v. *Reed*, 12 Pa. Super. Ct. 112.

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[6] E. St. Louis *v.* Trustees of Schools, 102 Ill. 489.
[7] Charity Hospital *v.* Stickney, 2 La. Ann. 550.
[8] § 64 *a*.